No. 82-1349

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner,
v.
S.A. EMPRESA DE VIACAO AEREA RIO GRANDENSE (VARIG AIRLINES),
Respondent.

UNITED STATES OF AMERICA,
Petitioner,
v.
EMMA ROSA MASCHER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENT VARIG AIRLINES IN OPPOSITION TO PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

1. Whether the United States can be held liable under the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, for the negligence of Federal Aviation Administration ("FAA") employees in inspecting the design of a commercial transport category aircraft * for type certification purposes which did not comply with the Federal Aviation Regulations ("FARs"), where a private person in similar circumstances would be held liable under the "Good Samaritan" doctrine of the applicable state law.

2. Whether the discretionary function exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(a), bars claims based on the FAA's negligent inspection for type certification purposes of commercial transport category aircraft, where the FAA inspectors approved an aircraft design which did not comply with detailed, mandatory FAA safety regulations, and the noncompliance was both obvious and substantial.

3. Whether the misrepresentation exception of the Federal Tort Claims Act, 28 U.S.C. § 2680(h), bars claims based on the FAA's negligent inspection for type certification purposes of the design of commercial transport category aircraft.

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* "Transport category" aircraft are those certificated in accordance with 14 C.F.R. Part 25 and include all large aircraft weighing over 12,500 lbs.

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BRIEF OF RESPONDENT VARIG AIRLINES IN OPPOSITION TO PETITION FOR CERTIORARI

Respondent S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) (hereinafter "VARIG") submits this brief in opposition to the petition for a writ of certiorari filed by the United States of America.[1]

STATEMENT OF THE CASE

The government's petition gives only a brief outline of the facts that gave rise to this case. See Petition for Cer-

[1] VARIG is a Brazilian corporation having no known subsidiaries, affiliates or parent corporations. See Supreme Court Rule 28.1.

tiorari at 2-6.[2] Since the issues presented here are heavily fact-dependent, VARIG believes that a fuller discussion of the considerable evidence in the record below is essential to a proper disposition of this case.

A. Facts of the Crash

On July 11, 1973, VARIG's Flight 820 took off from Rio de Janeiro for a scheduled eleven-hour nonstop flight to Paris.[3] The aircraft was one of VARIG's 707 jet aircraft manufactured by Boeing. The flight progressed without incident until a few minutes before landing at Orly Airport, when a passenger exited from the aft lavatory of the aircraft and reported smoke to the flight attendants. Within the space of four to six minutes, an in-flight fire on board the aircraft in the aft lavatories reached such intensity that it caused thick, black smoke to roll forward from the extreme aft section of the aircraft through both passenger cabins into the cockpit. Within moments, the smoke was so dense that cabin crew members could not see the exit windows or the passengers, and the pilots could neither see each other nor any of their flight instruments. As a result, the pilots opened the sliding windows in the cockpit and stuck their heads out into the windstream in order to make a crash landing into a field just a few miles from Orly Airport.

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[2] The government's petition in this case largely incorporates by reference its petition in *United States v. United Scottish Insurance Co.*, No. 82-1350, which involves the same issues as the present case. The petition in this case will be referred to hereinafter as "Pet." The petition in *United Scottish* will be referred to as "*United Scottish* Pet."

[3] Because the aircraft crashed in France, the official accident investigation came under the jurisdiction of a French Commission of Inquiry. Rudolf Kapustin, Senior Accident Investigator for the United States National Transportation Safety Board, was assigned to the French Commission as the Accredited Representative of the United States. Mr. Kapustin's deposition testimony and the exhibits introduced during his deposition, including the Final Report of the French Commission, establish the facts set forth in the text concerning the crash.

When the plane came to a stop in the field only six minutes after the smoke was first discovered, most of the people in the plane were unconscious or dead from asphyxiation or toxic gases. Seven crew members and one hundred seventeen passengers—a total of 124 persons—died in the crash. The aircraft—valued at six million dollars—was totally destroyed.

B. Accident Investigation and Probable Cause of the Crash

The official accident investigation was conducted by the French Commission of Inquiry with the assistance of Mr. Kapustin, who took part in preparing the Commission's official Final "Probable Cause" Report, which was issued on April 6, 1976. (Kapustin deposition, Exhibits 30, 31). This Final Report concludes that "[t]he probable cause of the accident is a fire which appears to have broken out in the sink unit of the rear starboard lavatory. . . . The fire could have been caused by either an electrical incident or by passenger carelessness." Mr. Kapustin testified that he agreed with this "probable cause" conclusion, and with the view that the fire probably started in the towel disposal area located in the sink unit of the aft lavatory. (Kapustin deposition, at 1204-06). In the district court the government admitted for purposes of its summary judgment motion that "the fire did originate in the lavatory waste container." [4]

As part of the accident investigation, Mr. Kapustin observed VARIG's voluntary teardown of the aft lavatories of an identical "sister ship" to the 707 that crashed. (Kapustin deposition, at 698-875). According to Mr. Kapustin's testimony, passengers deposit waste towels and other papers through a spring-loaded door beneath the sink in the lavatory. These waste towels do not fall into an enclosed metal container under the sink. Instead,

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[4] United States' Memorandum of Points and Authorities in Support of its Motion for Summary Judgment, at 6.

they fall into an open area located under the sink and behind a service door.

As the teardown of the sister ship's lavatory progressed, the investigators could see that the sink and cabinet module is installed into the aircraft as a single unit. When the investigators removed the sink and cabinet module from the aircraft bulkhead and observed the back of the unit, there were several large holes in it. (Kapustin deposition, at 904-16).

As part of the investigation, Mr. Kapustin attempted to determine whether the design of the lavatory sink unit complied with the FAA's Federal Aviation Regulations ("FARs") and their predecessors, the Civil Air Regulations ("CARs"). For present purposes, the most critical regulation is CAR 4b.381(d), which was identified by Mr. Kapustin as being in effect at the time the Boeing 707 was certificated by the FAA. (Kapustin deposition, at 715-18 and Exhibit 22.8). CAR 4b.381(d) provides in pertinent part as follows:

FIRE PROTECTION

§ 4b.381 *Cabin interiors.* All compartments occupied or used by the crew or passengers shall comply with the following provisions.

. . . .

(d) All receptacles for used towels, papers, and waste shall be of fire-resistant material, and shall incorporate covers or other provisions for containing possible fires.

Mr. Kapustin testified in unequivocal terms that the towel disposal area in the 707 lavatory sink unit did *not* comply with CAR 4b.381(d):

Q. [By Mr. Bostwick] Directing your attention to Exhibit 22.8, which is the section 4b.381(d). . . . I would like to ask you in what regard did the aft lavatory trash container area of the 707's, such as operated by VARIG, fail to comply with that section, in your opinion?

. . . .

A. [By Mr. Kapustin] Well, sir, the compartment, as such, did not, first of all, contain any—*it was not a container.* It was strictly a compartment into which the wastepaper material was allowed to fall when it was introduced by the flapper door that's up on top of the module.

Number 2, *the area, in itself,* if this were to be a container, *contained flammable material,* such as the plastic tubing for the water drains, the door, the large door, was of a wood composition material, which although it could have been fire-resistant, to a degree, contained fabric, trim, which was not.

The entire compartment has large holes in it. These holes, even though they wore a cover which was air-tight, would have made the entire compartment non air-tight and completely incapable of containing any fire or smoke.

. . . .

Q. Mr. Kapustin, in connection with the words in that regulation that refer to receptacles, "and shall incorporate covers or other provisions for containing possible fires," did you reach a conclusion as to whether or not this trash container area incorporated such a cover, or other provisions, that's referred to in that regulation.

. . . .

A. Yes, sir.

Q. What was your conclusion in that regard?

A. *That there is no cover.* There's a flapper door, that was opened to put the wastepaper into the container, *but there was no cover, as such.*

(Kapustin deposition, at 1065, 1069-72, emphasis added).

Later in his deposition, Mr. Kapustin reiterated his view that the lavatory sink unit "was not capable of containing fire or smoke"; that "[i]t was a simple open and shut situation, that the compartment did not meet the requirements"; and that "the compartment was full of holes and air spaces, and simply could not, *by any stretch of the imagination,* be considered capable of containing a

fire if a fire were to occur in that compartment." (Kapustin deposition, at 1597, 1625, emphasis added).

As a result of Mr. Kapustin's investigation the NTSB issued certain "Safety Recommendations,"[5] which included a recommendation to the FAA that it "reevaluate certification compliance with section 4b.381(d) of the Civil Air Regulations on Boeing 707 series aircraft." (Kapustin deposition, Exhibit 22.17). The FAA, which is required by statute[6] to respond to the NTSB's Safety Recommendations, conducted an investigation into the compliance of the Boeing 707 with applicable federal regulations, including CAR 4b.381(d). This investigation was conducted by Richard Nelson, an FAA airworthiness engineer, who went to Brazil to participate in the teardown of PP-VJZ's sister ship. In general, Mr. Nelson agreed with Mr. Kapustin's findings. Specifically, Mr. Nelson concluded that with respect to CAR 4b.381(d), the towel disposal area "appeared unsatisfactory from the fire containment standpoint," and that "it was not clear how the waste containers could possibly contain fire, as required by CAR 4b.381(d) . . . ." (Nelson deposition, at 351-54 and Exhibit 26). Following Mr. Nelson's investigation the FAA responded to the NTSB's Safety Recommendations, reporting that, with regard to the 707 waste paper containers, it had discovered "some deficiencies associated with the [fire] containment provisions" of CAR 4b.381(d).[7]

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[5] NTSB Safety Recommendations A-73-67 through 70, dated Sept. 5, 1973.

[6] See 49 U.S.C. §§ 1903, 1906.

[7] As a result of the investigation, the FAA issued two mandatory Airworthiness Directives requiring installation of ash trays and "No Smoking" signs in 707 lavatories and requiring compliance with a Boeing Service Bulletin providing for sealing or covering the gaps and holes in the sink unit. The rationale for the Airworthiness Directives was that the sink unit was incapable of containing fire and that it was possible for fires originating there to "develop into uncontrollable cabin fires leading to aircraft destruction and loss of life." (Kapustin deposition, Exhibits 21.1, 21.3).

C. Certification of the Boeing 707

The Boeing 707 type aircraft was certificated under the Federal Aviation Act of 1958, 49 U.S.C. § 1301-1542, which requires the FAA "to promote safety of flight of civil aircraft in air commerce" and to perform its duties "in such manner as will best tend to reduce or eliminate the possibility of, or recurrence of, accidents in air transportation . . . ." 49 U.S.C. § 1421.[8] In order to achieve these safety goals, the Act establishes a mandatory certification procedure. Manufacturers who wish to produce commercial aircraft must obtain from the FAA a Type Certificate for the aircraft. 49 U.S.C. § 1423(a)(2). A Type Certificate is issued if the aircraft meets the minimum design criteria specified in the detailed safety regulations promulgated by the FAA. *See* 14 C.F.R. Parts 21 & 25. An Airworthiness Certificate must also be obtained for each aircraft manufactured pursuant to a Type Certificate. The Airworthiness Certificate is issued if the particular aircraft conforms to the design specified in the Type Certificate and is otherwise in condition for safe operation. 49 U.S.C. § 1423(c); 14 C.F.R. § 21.171-21.199.[9]

The certification process begins when the manufacturer submits an application for a Type Certificate. The applicant provides FAA engineers with detailed plans, data

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[8] VARIG's accident aircraft was one of the Model 707-300C series of aircraft, for which the Type Certificate was issued in 1963. (Excerpt of Record in the court of appeals, at 275). However, some of the review work upon which the Type Certificate is based was performed before 1958 pursuant to the predecessor of the 1958 Federal Aviation Act, the Civil Aeronautics Act of 1938, 52 Stat. 973. For purposes of this petition, there is no significant difference between the policies and procedures of the 1938 Act and the 1958 Act.

[9] Rocco Lippis, who was Chief of the FAA's Aircraft Engineering Branch in Seattle, Washington, testified at his deposition that the principal purpose of the entire aircraft certification process is to promote aviation safety and that "the principal beneficiaries of that certification process were the passengers and the operators of the airplanes that" the FAA certificated. (Lippis deposition, at 181-82).

and documentation showing what it proposes to build and how it intends to demonstrate compliance with FAA regulations. (Lippis deposition, at 30-31). The FAA engineers then "sift through" the documentation to verify that there has been compliance with each applicable regulation. (Nelson deposition, at 410-11, 413; Lippis deposition, at 39, 46, 55-56, 65, 135). After the applicant's data has been analyzed and the aircraft constructed, an FAA employee, called a "manufacturing inspector," must also inspect the aircraft in a "conformity inspection" to determine if detail design features, such as lavatory trash containers, comply with the approved design and with the applicable regulation. (Nelson deposition, at 449-51).

The FAA engineers performing the certification inspections and design reviews may not disregard any applicable regulations, nor do they have authority to conclude that compliance with a particular regulation is unnecessary. Their function is simply to compare the design with the regulations and to determine whether the design meets the minimum regulatory requirements. If it does not, the FAA inspectors have no discretion to accept the design notwithstanding the deficiency. Rather, the Type Certificate *must* be withheld until the manufacturer submits a design modification or other means of correcting the deficiency.

The role of FAA inspectors in the certification process was discussed at length in the depositions of FAA employees Richard Nelson and Rocco Lippis. For example, Mr. Nelson confirmed that CAR 4b.381(d) is clear and that an aircraft cannot be certificated if it does not comply with that regulation. Mr. Nelson testified:

> Q. [By Mr. Lenhart, counsel for VARIG] And to the extent that those trash containers would not contain fire as a result of those holes, they would not be in compliance with 4b.381(d)?
>
> . . . .

A. THE WITNESS [Mr. Nelson]: I don't know that I understand the question that well, but *the container either does or doesn't contain the fire. There is no in between.*

Q. And if it doesn't contain fire, then it doesn't comply with 4b.381(d) in your view?

A. Yes . . . .

. . . .

Q. But to be type certificated, the lavatories on an aircraft *must* comply with that regulation?

A. *Yes.*

(Nelson deposition, at 149-50, emphasis added).

Similarly, Mr. Lippis testified that FAA regulations are "mandatory on . . . the certificating engineer" and "must be complied with." (Lippis deposition, at 132-33). The FAA engineers are charged with the responsibility of ensuring "compliance with the regulation"; and to this end, they are required to "check into every item" to make "sure that the Boeing Company complied" with the regulations. (*Id.* at 37, 46). Compliance with all regulations is regarded as "essential," and "everything will be signed off" before the first FAA flight test of the aircraft. (*Id.* at 81). The purpose of flight-testing the aircraft is to "make damn sure it meets regulation." (*Id.*)

In the present case, the evidence is to the effect that the FAA *never* inspected or reviewed the design of the 707 lavatory trash container to verify compliance with CAR 4b.381(d). As part of his post-accident investigation, Richard Nelson searched the FAA's records in an attempt to find evidence that the waste container had been inspected for compliance with CAR 4b.381(d). He was unable to find any such evidence. (Nelson deposition, at 139-42). During discovery in the district court, the government was likewise unable to produce any evidence that the 707 lavatory waste container was ever actually inspected, despite repeated requests for such evidence by VARIG.

VARIG sought from the United States the identity of the person who inspected the 707 lavatory waste containers. The United States provided the names of several people who "might" have been involved in the inspection. VARIG took the depositions of FAA employees Jack Bulmer, Rocco Lippis and Harold Tanke; but none of the witnesses had inspected the trash container, and none could provide any evidence that someone else had performed the inspection. VARIG also made repeated requests to the United States for any documents showing that the 707 waste containers had been inspected. The only evidence produced by the government was two documents. One was a letter from former FAA employee W. A. Klikoff to Boeing stating that "final approval of the various interior arrangements [on the 707 model] will be dependent upon our inspection of the completed airplane." The other document was entitled "Check List Interior Arrangement" and was to be filled out by an FAA employee, now deceased, W. B. Spelman. One of the items listed was "CAR 4b.381(d) CHECK FOR: Fire resistant, covered waste containers." (Excerpt of Record in the court of appeals, at 242). The check list was never filled out by Mr. Spelman; and there was no indication that he, or anyone else, actually checked the lavatory trash containers prior to type certification. (Curtiss deposition, at 156).

Thus, although compliance with all FAA regulations is admittedly "mandatory" and "essential," it appears that the FAA never checked to determine whether the lavatories in the 707 aircraft complied with CAR 4b.381 (d), until *after* the VARIG crash had destroyed a 707 aircraft and killed 124 people.

D. Disposition in the Courts Below

VARIG commenced this action in the district court seven and one-half years ago, on January 16, 1976, seeking to recover six million dollars for the total destruction of its 707 jet aircraft. VARIG's complaint stated a claim against the government under California's Good Samari-

tan doctrine. VARIG alleged that the government had undertaken to inspect and issue Type Certificates for commercial aircraft; that VARIG relied upon the undertaking; that the government had negligently performed its undertaking with respect to the Boeing 707; that the FAA had negligently issued a Type Certificate for the Boeing 707 when it knew or should have known that its design did not comply with the applicable FARs; that this negligence increased the risk of harm to users and operators of 707s and that it proximately caused the destruction of VARIG's aircraft.[10]

On October 31, 1980, the government moved for summary judgment, arguing that VARIG's First Amended Complaint should be dismissed with prejudice because the FAA owed no duty of care to VARIG or anyone else and because all of VARIG's claims are barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. §§ 2680(a), 2680(h). No supporting affidavits were filed with the motion and no admissible evidence was ever offered by the government to contradict the allegations in VARIG's complaint. In opposition to the motion, VARIG submitted, among other things, the affidavit of its Manager of Engineering and Maintenance Base, Frederico J. Ritter. With regard to VARIG's allegations of reliance Mr. Ritter stated:

> When a manufacturer like BOEING has a "type certificate" for an aircraft model, such as the BOEING 707, VARIG relies upon the fact that BOEING has completed all of the tests and other requirements laid down by the U.S. FAA, in obtaining that type certificate. VARIG neither seeks nor reviews the mass of detailed design drawings, data, tests and other documentation submitted by BOEING

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[10] First Amended Complaint ¶¶ 11-15 (Excerpt of Record in the court of appeals, at 5-7). All parties agree that California law governs this action.

> to the FAA when applying for such a type certificate. Such a review is completely beyond the scope and purpose of VARIG's engineering department. Similarly, when a manufacturer like BOEING has completed an aircraft which has been built pursuant to a type certificate, such as PP-VJZ, the U.S. FAA physically inspects that aircraft to see that it complies with the U.S. FAA's Federal Air Regulations ("FAR's") before issuing the individual aircraft an "airworthiness certificate." . . . The airline does not go behind these two certificates to review the documentation submitted by the manufacturer to show compliance with the regulations. Neither does the Brasilian Government when the aircraft is registered in Brasil. . . . In summary, the airline purchases an aircraft which it assumes was certificated to a certain level of airworthiness. Thereafter, the job of the airline's engineering and maintenance department is to *maintain* that level of airworthiness and not allow it to degrade.

Ritter Affidavit ¶ 3 (Excerpt of Record in the court of appeals, at 218-19). The Ritter Affidavit remains completely uncontradicted in this case.

The district court granted the government's motion for summary judgment, concluding that VARIG's action should be dismissed with prejudice because the FAA owed no duty of care to VARIG or anyone else, because the Good Samaritan doctrine was inapplicable, and because all of VARIG's claims are barred by the discretionary function and misrepresentation exceptions to the Federal Tort Claims Act, 28 U.S.C. §§ 2680(a), 2680(h). Pet. App. 8a-13a. However, the district court rejected proposed findings of fact submitted by the government to the effect that there was no negligence by the FAA, no reliance by VARIG and no increase in the risk of harm to VARIG.[11]

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[11] The district court struck out the following proposed findings of fact submitted by the government:

[Footnote continued on page 13]

On appeal, the Ninth Circuit reversed. 692 F.2d 1205 (9th Cir. 1982) (Pet. App. 1a-7a). The court of appeals held that the government could be held liable for negligent inspection and type certification of commercial transport category aircraft under California's Good Samaritan doctrine, and that neither the discretionary function exception nor the misrepresentation exception of the Tort Claims Act barred the action. At the same time, the court of appeals also handed down its decision reaching the same result in the *United Scottish* case. 692 F.2d 1209 (9th Cir. 1982) (*United Scottish* Pet. App. 1a-6a). The present case and the *United Scottish* case were both argued on the same day before the same panel of the court of appeals, and both cases raise the same legal issues. In *United Scottish*, however, the government was appealing from a judgment in favor of the plaintiffs following a full trial and extensive findings of fact and conclusions of law.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

The Ninth Circuit's decision is clearly correct. That the United States can be held liable under Good Samaritan principles has been well settled since at least 1955, when this Court decided *Indian Towing Co. v. United*

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[11] [Continued]

13. The United States of America's inspection and certification of the Boeing 707 aircraft did not increase the risk of harm to Plaintiffs.

14. The United States of America's inspection and certification of the Boeing 707 aircraft did not induce reliance by the Plaintiffs.

17. There was no negligence on the part of the United States of America or any of its employees that was a proximate cause of this accident.

Excerpt of Record in the court of appeals, at 18.

Appendix B to the government's petition in this case correctly omits findings of fact numbers 13 and 14, above, but erroneously includes finding number 17, above. Pet. App. B, 10a.

States, 350 U.S. 61 (1955). It is equally well established that the discretionary function exception has no application where, as here, government employees working at the operational level violate highly specific, mandatory government regulations. In effect, the regulations deprive the FAA employees of all discretion and thereby render the discretionary function exception inapplicable. Finally, this Court's recent decision in *Block v. Neal*, No. 81-1494 (U.S. March 7, 1983), disposes of the government's misrepresentation argument. In that case, the Court held that the misrepresentation exception does not bar claims based on the government's negligence in performing its inspection activities. The same rule applies here.

In short, this case does not raise any important legal issue that can fairly be characterized as unsettled. Supreme Court review is therefore unnecessary and certiorari should be denied.

ARGUMENT

I. THE GOVERNMENT CAN BE HELD LIABLE FOR BREACHING ITS GOOD SAMARITAN DUTY TO VARIG

The court of appeals held that the government, having voluntarily assumed the inspection and certification of all civilian aircraft, may be held liable under California's Good Samaritan rule for negligent inspection and certification resulting in injury. It said:

> An individual inspecting and certifying aircraft design for safety in California would be judged by the rule set forth in Restatement (Second) Torts, §§ 323 and 324A. Therefore, the United States is to be judged under the same rule. . . .
>
> . . . .
>
> The United States, through the F.A.A., has voluntarily undertaken the inspection and certification of all civilian aircraft. . . .

> . . . The United States should expect that members of the public will rely on the proper performance by the F.A.A. of its duty to inspect and certify. Under California law, a private person inspecting and certifying aircraft for airworthiness would be liable for negligent inspection under that state's good samaritan rule. It follows that the United States also falls within the rule.

Pet. App. 3a, 5a.

Calling this holding "preposterous" (Pet. at 16), the government argues that the Good Samaritan doctrine is inapplicable. The government argues that it cannot be held liable under the Tort Claims Act because the inspection and certification of aircraft is "regulatory conduct" that has no "counterpart" in the private sector and is a uniquely "governmental" function. *United Scottish* Pet. at 13. This is in substance the same shop-worn argument that the government has been making—and the courts have been rejecting—for the last thirty years.

For example, in *Indian Towing Co. v. United States*, *supra*, p. 13, at 64, the government insisted that it could not be liable because operation of a lighthouse is a "uniquely governmental function" that private persons do not perform. The Court rejected this argument, noting that it would "push the courts into the 'non-governmental'—'governmental' quagmire that has long plagued the law of municipal corporations." *Id.* at 65. As the Court recognized, *all* government activity "is inescapably 'uniquely governmental' in that it is performed by the Government." *Id.* Thus, to distinguish between "governmental" and "non-governmental" activities would be "to draw distinctions so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation." *Id.* at 68. The Court also pointed out that to accept the government's argument would be to make liability turn on "a completely fortuitous circumstance—the presence of identical private activity." *Id.* at 67. The

Court was unwilling to attribute any such "bizarre motives" to Congress. *Id.*[12]

We think it fair to say that the "governmental function" defense urged here was completely repudiated by *Indian Towing*. It has been consistently repudiated in subsequent cases,[13] including cases involving air traffic controllers[14] where the government argued unsuccessfully for years that it could not be held liable because its controllers "perform governmental functions of a regulatory nature that are not performed by individuals." *Eastern Air Lines, Inc. v. Union Trust Co.*, 221 F.2d 62, 73 (D.C. Cir.), *aff'd sub nom.*, 350 U.S. 907 (1955). In *Union Trust* the court of appeals disagreed with the government and this Court affirmed summarily on the authority of *Indian Towing*. *United States v. Union Trust Co.*, 350 U.S. 907 (1955).[15]

Furthermore, the government is incorrect as a matter of *fact* when it contends here that inspection of aircraft has no counterpart in the private sector. The district court in *United Scottish* found as a fact that private persons inspected aircraft for safety and airworthiness before 1926, when the government began providing such

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[12] *Indian Towing* established the legal principle that the government's liability does not turn on the presence or absence of comparable private activity.

[13] *See, e.g., Rayonier, Inc. v. United States*, 352 U.S. 315, 318-19 (1957), in which this Court rejected the government's argument that it could not be liable because its firemen act only in a "uniquely governmental capacity."

[14] *See, e.g., Ingham v. Eastern Air Lines, Inc.*, 373 F.2d 227, 238 (2d Cir.), *cert. denied*, 389 U.S. 931 (1967); *Gill v. United States*, 429 F.2d 1072 (5th Cir. 1970); *Deweese v. United States*, 576 F.2d 802 (10th Cir. 1978); *Pierce v. United States*, 679 F.2d 617 (5th Cir. 1982).

[15] The court of appeals in *Union Trust* pointed out, among other things, that the private sector had provided air traffic control services until the government took over that function. 221 F.2d at 74.

services. *United Scottish* Pet. App. 18a-19a, 24a. The court of appeals affirmed this finding.[16]

Thus, the "governmental function" defense has been thoroughly discredited; there is no reason to resurrect it here; and in any event it is inapplicable as a matter of fact. The government apparently senses the futility of its position, for it quickly switches to another tack—a general assault on the application of the Good Samaritan doctrine to the facts and circumstances of this case. *United Scottish* Pet. at 15-18. The government does not dispute that it can be held liable under Good Samaritan principles for negligent performance of a service that it has voluntarily undertaken to provide. *Indian Towing* settled that point long ago. *Supra* p. 13, at 64-65. Neither does the government dispute that California law controls and that California has adopted the Good Samaritan doctrine as embodied in sections 323 and 324A of the *Restatement (Second) of Torts*. *See Coffee v. McDonnell Douglas Corp.*, 8 Cal. 3d 551, 503 P.2d 1366, 105 Cal. Rptr. 358 (1972). Having accepted these basic governing principles, the government is left with a series of narrow, technical arguments about how the principles should be applied in this case. All of the points raised by the government are insubstantial and certainly not of sufficient importance to warrant review by certiorari.

First, the government asserts that the FAA merely "retains the option" of inspecting aircraft to ensure compliance with the applicable regulations. *United Scottish* Pet. at 15. This is clearly incorrect as a matter of fact. As discussed above, the FAA's own employees testified in this case that compliance with the FARs is mandatory and that the FAA *must* check *every* component against the regulations before certificating the aircraft.

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[16] The court of appeals in *United Scottish* did *not*, contrary to the government's suggestion (*United Scottish* Pet. at 15), "acknowledge" that there was no comparable private-sector activity. *See United Scottish* Pet. App. at 1a-6a. In any event, the Supreme Court does not ordinarily review factual disputes. *See, e.g., Berenyi v. Immigration and Naturalization Service*, 385 U.S. 630, 635 (1967).

See *supra* p. 9. Furthermore, the FAA's governing statute provides that the FAA may not issue a Type Certificate unless it finds that the aircraft meets the minimum safety standards set forth in the FARs. 49 U.S.C. § 1423(a)(2). The statute certainly does not give the FAA the "option" to disregard its own regulations or to ignore violations of those regulations.

We are also informed by the government's petition that airline operators retain "primary responsibility" for the safety of their aircraft. *United Scottish* Pet. at 15. The government does not explain the pertinence of this observation, and none is apparent. VARIG is no more "responsible" for safety than were the aircraft operators in the air traffic controller cases or the tug operator in *Indian Towing*. The government was held liable in those cases, and they cannot be distinguished from the present case on any theory of "primary responsibility."

The government asserts that aircraft passengers are "not entitled" to rely upon FAA safety inspections. *United Scottish* Pet. at 15. The government does not indicate why this should be so. Indeed, it cites no evidence in the record and no court decision, statute, regulation or other authority to support its bald assertion. *Indian Towing* teaches us that when the government voluntarily undertakes to provide a service, members of the public are "entitled" to rely upon the undertaking at least in the sense that they can recover under the Tort Claims Act for negligent performance of the undertaking.[17]

The government also expresses disbelief that any of the passengers actually relied upon the FAA inspections. *United Scottish* Pet. at 16 & n.6. Yet, here, the government is simply arguing against findings of fact made by

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[17] The government also makes the apparently related argument that it owes a duty of care to the general public, but not to any particular member of the public. *United Scottish* Pet. at 14-15. Again, no authority is cited in support of the government's assertion. This argument on its face defies all logic and is directly inconsistent with *Indian Towing* and its progeny and with the air traffic controller cases.

the district court and accepted by the court of appeals. *See United Scottish* Pet. App. 3a-4a, 20a-25a; Pet. App. 5a. The losing party's dissatisfaction with determinations of fact does not call for Supreme Court review. In addition, the government has conspicuously omitted any discussion of VARIG's reliance upon the FAA's inspections. The reason for the omission is not hard to find. VARIG's complaint alleged reliance and the government's motion for summary judgment in the district court was not supported by any admissible evidence offered to pierce that pleading. In addition, in opposition to the government's motion VARIG submitted the affidavit of the Manager of its Engineering and Maintenance Base, Frederico J. Ritter, which describes in detail the heavy reliance that VARIG places upon the FAA inspection and type certification. That affidavit was never contradicted in any way by the government. Finally, the district court, even though it granted summary judgment, rejected the government's proposed finding of fact that there had been no reliance by VARIG here.[18]

The government also argues that its negligence did not increase the risk of injury to the passengers. *United Scottish* Pet. at 15. The same response is applicable: VARIG pleaded increased risk; the government never pierced this pleading with admissible evidence and the district court rejected the government's proposed finding of fact that the risk had not been increased. Moreover, under section 323 of the *Restatement*, Good Samaritan liability attaches *either* if the "Samaritan's" negligent performance of his undertaking increases the risk of harm to the plaintiff, *or* if the "Samaritan's" undertak-

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[18] This serves to distinguish *Clemente v. United States*, 567 F.2d 1140 (1st Cir.), *cert. denied*, 435 U.S. 1006 (1978), and *Raymer v. United States*, 660 F.2d 1136 (6th Cir. 1981), *cert. denied*, —— U.S. ——, 102 S. Ct. 2009 (1982), upon which the government relies. *United Scottish* Pet. at 17. As the government itself points out, it won those cases because the plaintiffs were unable to show the requisite reliance.

ing engenders reliance by the plaintiff. The requisite reliance has clearly been established here and the government can be liable based on that fact. In any event, it is obvious that the FAA's negligence *did* increase the risk of harm in this case. If the FAA had not been negligent, Boeing would have been forced to correct the defective design or it would not have received a Type Certificate enabling it to manufacture 707 model aircraft, including VARIG's accident aircraft. VARIG would not have been put in the position of unwittingly operating an aircraft with a defective and unsafe lavatory waste container, and the accident would not have occurred.[19]

The government's final contention concerning duty is that the lower court's decision will put it in the position of "guaranteeing the safety of aircraft" and will make it an "insurer" of all activity subject to safety inspection. *United Scottish* Pet. at 17. This is nonsense. As the court of appeals made clear, the government will be held liable only when it *negligently* performs the duty it has undertaken. *United Scottish* Pet. App. 5a-6a. The government will be forced to pay only when it is at fault. That is exactly what Congress had in mind when it passed the Tort Claims Act. Moreover, the government's dire claims of ruinous liability have become routine in Tort Claims Act cases, and they are routinely rejected by the courts. The Court is not to act "as a self-constituted guardian of the Treasury," by importing "immunity back into a statute designed to limit it." *Indian Towing Co. v. United States*, *supra* p. 13. If the financial burdens of the Tort Claims Act should ever become excessive, it

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[19] In this respect, the present case is similar to *Block v. Neal*, *supra* p. 14, in which this Court noted that, according to the plaintiff's allegations, if the government housing inspector had not been negligent, the builder would have been forced to correct the defects or would not have been allowed to turn the house over to the plaintiff.

will be for Congress, not the courts, to find the appropriate remedy.[20]

II. VARIG'S CLAIMS ARE NOT BARRED BY THE DISCRETIONARY FUNCTION EXCEPTION

The government's second argument is that VARIG's claims are barred by the discretionary function exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(a). *United Scottish* Pet. at 18. The government relies heavily in its argument on certain language in *Dalehite v. United States*, 346 U.S. 15 (1953)—the seminal case on the discretionary function exception. In that case, the Court ruled that discretionary functions include "determinations made by executives or administrators in establishing plans, specifications or schedules of operation," as well as "initiation of programs and activities." *Id.* at 35-36. *Dalehite* held that "[w]here there is room for policy judgment and decision there is discretion." *Id.* at 36. The governmental decisions in question in *Dalehite* were determined by the Court to have been "responsibly made at a *planning* rather than *operational* level." Id. at 42

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[20] To the extent that the purposes behind the Tort Claims Act include deterrence of governmental negligence which can cause injury or death to persons and property, in addition to the purpose of compensation for the victims, the court of appeals decision in this case is in harmony with that purpose. It is also in harmony with the conclusions, findings and recommendations of the congressional committee which investigated the FAA's performance in the inspection and type certification of transport category aircraft following the crash of a Turkish Airlines DC-10 near Paris, France, on March 3, 1974, which resulted in 346 deaths, and the crash of an American Airlines DC-10 at Chicago, Illinois on May 25, 1979, which resulted in 273 deaths. See House Committee on Government Operations, "A Thorough Critique of Certification of Transport Category Aircraft by the Federal Aviaiton Administration," H.R. Rep. No. 924, 96th Cong., 2d Sess. (1980). In that report the Committee found that "[t]here are serious deficiencies in all three phases of the certification process [design, production and maintenance] which must be corrected [by the FAA] if the record of aviation safety is to be maintained or continue to improve." *Id.* at 4.

(emphasis added). Thus, *Dalehite* established the basic distinction between government negligence at the "planning" level, which falls within the discretionary function exception, and negligence at the "operational" level, which does not. This distinction has been followed in an extremely long line of cases interpreting the discretionary function exception.[21]

The court below correctly applied the foregoing principles in holding that "[t]he duties undertaken by FAA inspectors are more like those of the lighthouse keepers in *Indian Towing* than those of the cabinet level secretaries in *Dalehite*." Pet. App. 7a. The court said:

> The kind of discretion contemplated by the exemption clause does not exist in certifying compliance with F.A.A. safety regulations. A proper inspection will discover facts. The facts will show either com-

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[21] *E.g., Madison v. United States*, 679 F.2d 736, 741 (8th Cir. 1982) (failure to enforce regulations and to conduct safety inspections occurred at operational level); *Carlyle v. United States, Dept. of the Army*, 674 F.2d 554, 556-57 (6th Cir. 1982) (extent of supervision of Army recruits lodged at hotel was planning level decision); *Emch v. United States*, 630 F.2d 523, 528 (7th Cir. 1980), *cert. denied*, 450 U.S. 966 (1981) (regulation of bank that became insolvent took place at policy level); *Aretz v. United States*, 604 F.2d 417, 428 (5th Cir. 1979) (failure to change hazard classification of illuminant and to communicate change to defense contractor occurred at operational level); *Ward v. United States*, 471 F.2d 667, 670 (3d Cir. 1973) (negligent operation of aircraft is operational activity); *Ingham v. Eastern Air Lines, Inc., supra* note 14, at 238-39 (air traffic controller's failure to report weather changes was operational); *United Air Lines, Inc. v. Wiener*, 335 F.2d 379, 394, 396 (9th Cir.), *cert. dismissed*, 379 U.S. 951 (1964) (failure to make study of commercial air traffic patterns in accordance with official direction and to secure flight clearance and traffic information for jet pilots were operational decisions); *White v. United States*, 317 F.2d 13, 17 (4th Cir. 1963) (operational decision to allow mental patient free access to hospital grounds not discretionary); *United States v. Gregory*, 300 F.2d 11, 13 (10th Cir. 1962) (decision to renovate canals resulting in drainage of private fish ponds not operational).

> pliance or noncompliance. Aircraft must comply with the regulations in order to be certified.

Id.

The government's discretionary function argument in this case has a familiar ring. It was attempted without success in the early air traffic controller cases. As early as 1955 this Court affirmed a statement by the Court of Appeals for the District of Columbia that "discretion was exercised when it was decided to operate the [control] tower, but the tower personnel had no discretion to operate it negligently." *Eastern Air Lines v. Union Trust Co.*, *supra* p. 16, at 77. Eleven years later the Second Circuit followed this rationale in *Ingham v. Eastern Air Lines, Inc.*, *supra* note 14. In *Ingham* the court said:

> When the government decided to operate an air traffic control system, that policy decision was the exercise of "discretion" at the planning level, and could not serve as the basis of liability [citing *Dalehite*]. But once having made that decision, the government's employees were required thereafter to act in a reasonable manner. A failure to do so rendered the government liable for the omission or commission.

Id. at 238.

VARIG does not dispute that the government's decision —embodied in the Federal Aviation Act of 1958—to undertake inspection and certification of aircraft was made at the planning level and falls within the discretionary function exception. It is no doubt also true that the decision to issue CAR 4b.381(d) and the further determination of what requirements the regulation should contain involved a balancing of competing policy considerations and were discretionary within the meaning of the Federal Tort Claims Act.

However, once CAR 4b.381(d) had been adopted, the role of the FAA plainly descended to the operational level.

The FAA personnel who inspected the Boeing 707 were not acting in an executive planning capacity, nor were they making policy. Their function was simple—to determine whether the 707 complied with the detailed requirements of CAR 4b.381(d) and the other applicable regulations. The FAA inspectors had no discretion to modify or disregard the regulations; they were simply charged with the mechanical, operational task of applying the regulations to the aircraft at hand. As FAA employee Rocco Lippis testified at his deposition, FAA regulations are "mandatory on . . . the certificating engineer," who is required to "check into every item" to ensure compliance.

The case law is clear that the application of specific, mandatory regulations like CAR 4b.381(d) is not discretionary within the meaning of the Federal Tort Claims Act.[22]

None of the cases cited by the government (*United Scottish* Pet. at 19) provides any support for its position. *Garbarino v. United States*, 666 F.2d 1061 (6th Cir. 1981), held that the discretionary function exception barred a claim that the FAA negligently failed to promulgate crashworthiness regulations. Failure to implement a specific, mandatory regulation was not involved. Similarly, in *Bernitsky v. United States*, 620 F.2d 948 (3d Cir.), *cert. denied*, 449 U.S. 870 (1980), the court

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[22] *See, e.g., Hatahley v. United States*, 351 U.S. 173 (1956) (negligent administration of regulations not discretionary); *Madison v. United States*, *supra* note 21, at 741 (enforcement of safety regulations governing manufacture of explosives not discretionary); *Loge v. United States*, 662 F.2d 1268, 1273 (8th Cir. 1981), *cert. denied*, —— U.S. ——, 1025 S. Ct. 2009 (1982) (government has no discretion to disregard mandatory regulatory commands governing licensing and release of polio vaccines); *Griffin v. United States*, 500 F.2d 1059, 1068-69 (3d Cir. 1974) (implementation of regulation governing polio vaccine testing not discretionary); *United Air Lines v. Wiener*, *supra* note 21, at 394-95 (violation of Air Force regulation dealing with segregation of air traffic made discretionary function exception inapplicable).

found that the complaint challenged the government regulations themselves, not the manner in which they were enforced. The court observed that there was "no analogy between the negligent failure to comply with regulations . . . and the regulatory enforcement activity at issue here." *Id.* at 955. *First National Bank in Albuquerque v. United States*, 552 F.2d 370, 375-76 (10th Cir.), *cert. denied*, 434 U.S. 835 (1977), concerned implementation of a statute and regulations which "staked out only generalized policy standards" for labeling of pesticides, and thus required the government agency "to make policy judgments in evaluating the adequacy of the labeling." The court explicitly distinguished that case from situations where, as here, there is "measurement against given specific standards." *Id.* at 376.

The government argues that "discretion exists when the government attempts to police the safety of an industry and must make complicated and often predictive engineering or scientific judgments about the airworthiness of literally thousands of aircraft." *United States* Pet. at 18. This "engineering or scientific judgment," however, is one kind of discretion which Congress plainly did *not* mean to exempt from liability under the Federal Tort Claims Act. *See, e.g., Griffin v. United States*, *supra* note 22, at 1066 (government conduct is not immunized when based on scientific rather than policy judgment). While it may be inappropriate for courts to evaluate policy decisions by government officials, courts are routinely called upon to examine the judgments of engineers, doctors and other experts. Such judgments are hardly "essentially subjective," as the government claims. *United Scottish* Pet. at 19. As the Second Circuit has observed, the fact that "judgments of government officials occur in areas requiring professional expert evaluation does not necessarily remove those judgments from the examination of courts by classifying them as discretionary functions under the Act." *Hendry v. United States*, 418 F.2d 774, 783 (2d Cir. 1969). In this case, as shown by the deposi-

tion testimony of Rudolf Kapustin, noncompliance with the regulation here was an "open and shut" case. Not "by any stretch of the imagination" could the Boeing 707 have been considered to meet the fire-protection requirements of CAR 4b.381(d). (Kapustin deposition at 1597, 1625). Thus, no expert evaluation or fine professional judgment was required under the particular facts of this case.

Moreover, the evidence in this case suggests that the government failed entirely to inspect the lavatory or to determine compliance with CAR 4b.381(d). The government's attempt to clothe this failure with the dignity of a policy judgment by alluding to "the magnitude of the FAA's regulatory activities" is entirely disingenuous. *United Scottish* Pet. at 19. Whether or not the FAA is overburdened does not change the nature of the act in question—i.e., an operational level inspection for compliance with a mandatory regulation. If anything, it is the FAA's failure to enforce such safety regulations, not Tort Claims Act litigation, that threatens to "impair [the] vital governmental function" of "enforcing aircraft safety laws." *United Scottish* Pet. at 20.

Finally, it should be noted that the government has admitted that the discretionary function exception would be inapplicable to facts such as those presented here. In oral argument before this Court in *Block v. Neal*, *supra* p. 14, counsel for the United States conceded inquestioning by the Court concerning the discretionary function exception that:

> If there were a regulation in this case that said that the government must discover every defect and must make every defect corrected . . . then it would seem to me we would be hard pressed to argue that that is a discretionary decision, *because the regulation will have essentially taken away all our discretion.*
>
> But if the regulation *merely suggests* that we should have inspections . . . then it would seem clearly to be within the discretionary function exception.

Official Transcript Proceedings before the Supreme Court of the United States (Jan. 19, 1983) at 13-14, *Block v. Neal*, No. 81-1494 (U.S. March 7, 1983) (emphasis added). Unlike the regulation as interpreted by the government in *Block v. Neal*, CAR 4b.381(d) does not "merely suggest" that the FAA inspect for fire-containment safeguards. The regulation is mandatory and specific, and takes away all discretion from FAA inspectors in the issuance of Type Certificates.

In summary, this case presents a routine application of discretionary function analysis to the particular facts involved here. The court below correctly held that the exception does not apply. In any event, the Supreme Court does not sit to resolve essentially factual questions, such as those at issue here, on a case-by-case basis.

III. VARIG'S CLAIMS ARE NOT BARRED BY THE MISREPRESENTATION EXCEPTION

The government's final argument is that VARIG's claims are barred by the misrepresentation exception to the Federal Tort Claims Act, 28 U.S.C. § 2680(h). *United Scottish* Pet. at 20-22. The government's position on the misrepresentation exception has now been squarely foreclosed by this Court's recent decision in *Block v. Neal*, *supra* p. 14, and there is no reason for the Court to consider the issue again in this case.

In the present case the court of appeals found that the misrepersentation exception was inapplicable. It said:

> [VARIG's]claims . . . arise from the negligence of the inspection rather than from any ensuing misrepresentation contained in the resultant certificate. [citations omitted]. The certification merely reports results of the negligent inspection. *Neal v. Bergland*, 646 F.2d 1178, 1183-84 (6th Cir. 1981), *cert. granted*, 102 U.S. 2267 (1982) . . . .

Pet. App. 6a.

In *Neal v. Bergland*, 646 F.2d 1178 (6th Cir. 1981), *aff'd sub nom., Block v. Neal*, *supra* p. 14, relied upon by the court below, the Sixth Circuit arrived at a similar conclusion with respect to a negligent inspection of a house by an official of the Farmers Home Administration. The government sought a writ of certiorari in the *Neal* case, arguing that the Sixth Circuit should have held the plaintiff's claim barred by the misrepresentation exception. After certiorari had been granted in *Neal* and while the case was under submission, the government filed its certiorari petition in the present case. The government's position here acknowledged that the decision in *Neal* would "have a substantial bearing on the applicability of the misrepresentation exception to this suit." *United Scottish* Pet. at 22. Accordingly, the government suggested that "the Court may wish to hold this petition pending the decision in *Neal* . . . ." *Id.*

On March 7, 1983, this Court handed down its decision in *Neal*, affirming the judgment of the Sixth Circuit. The Court held that the misrepresentation exception did not apply because the gravamen of the plaintiff's claim was not the communication of misinformation, but rather the government's failure to use due care in inspecting and surpervising construction of the plaintiff's house. The Court explained its rationale in pertinent part as follows:

> In this case . . . the Government's misstatements are not essential to plaintiff's negligence claim. The Court of Appeals found that to prevail under the Good Samaritan doctrine, Neal must show that FmHA officials voluntarily undertook to supervise construction of her house; that the officials failed to use due care in carrying out their supervisory activity; and that she suffered some pecuniary injury proximately caused by FmHA's failure to use due care. FmHA's duty to use care to ensure that the builder adhere to previously approved plans and cure all defects before completing construction is distinct from any duty to use care in communicating information to respondent . . . . Neal's factual allegations

> would be consistent with proof at trial that Home Marketing would never have turned the house over to Neal in its defective condition if FmHA officials had pointed out defects to the builder while construction was still underway, rejected defective materials and workmanship, or withheld final payment until the builder corrected all defects.
>
> . . . .
>
> We therefore hold that respondent's claim against the government for negligence by FmHA officials in supervising construction of her house does not "aris[e] out of . . . misrepresentation" within the meaning of 28 U.S.C. § 2680(h). The Court of Appeals properly concluded that Neal's claim is not barred by this provision of the Tort Claims Act because Neal does not seek to recover on the basis of misstatements made by FmHA officials. Although FmHA in this case may have undertaken both to supervise construction of Neal's house and to provide Neal information regarding the progress of construction, Neal's action is based solely on the former conduct.

Slip opinion at 8-10.

Block v. Neal is directly on point here, and it compels rejection of the government's misrepresentation argument. As the court of appeals in this case held, VARIG's claims are based upon the FAA's negligent inspection of the 707 aircraft, not on any incidental communication of misinformation in the Type Certificate or elsewhere.[23] Under *Neal*, the misrepresentation exception clearly does not reach such claims. The issue has now been settled, and review by certiorari is therefore inappropriate.

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[23] *See* VARIG's First Amended Complaint ¶¶ 7, 13 (Excerpt of Record in the court of appeals, at 3-5, 7-8).

CONCLUSION

The court of appeals was clearly correct in reversing summary judgment in favor of the government in this case; there are no reasons for review by this Court; and the petition for a writ of certiorari should be denied. In the alternative, the petition should be granted and the judgment of the court of appeals should be summarily affirmed on the authority of *Block v. Neal*, No. 81-1494 (U.S. March 7, 1983), *Indian Towing Co. v. United States*, 350 U.S. 61 (1955), and *Dalehite v. United States*, 346 U.S. 15 (1953). *See United States v. Union Trust Co.*, 350 U.S. 907 (1955).

Respectfully submitted,

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